IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THERESA MARIE SIMEONE, Personal
Representative of the Estate of Albert Francis
Simeone, Jr., Deceased, and THERESA MARIE
SIMEONE, In Her Own Right, and
MARY ANN LENGYEL, Personal
Representative of the Estate of George Lengycl,
Deceased, and MARY ANN LENGYEL,
In Her Own Right

CIVIL ACTION NO. 02CV4852

JURY TRIAL DEMANDED

Plaintiffs,

٧.

BOMB ARDIER CORPORATION GmbH, et a].

Defendants.

REPLY BRIEF IN SUPPORT OF DEFENDANT
BRP-ROTAX GMBH & CO. KG's MOTION TO DISMISS
PLAINTIFFS'COM PLAINT FOR LACK OF JURISDICTION and
DEFENDANTS BOMBARDIER INC.'S AND BOMBARDIER CORPORATION'S
MOTION FOR SUMMARY JUDGMENT

Robert J. Kell Of Counsel	y, Esq.
Suna Lee, Esc On the Brief	Į.
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Arch v. American Tobacco Co., Inc.,

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Provident Nat'l Bank. v. Califomia Fed. S&L Ass'n. 819 F.2d 434 (3d Cir. 1987)
Quarles v. Fuqua Industries, Inc., 504 F.2d 13)58 (10" Cir. 1974)
Reverse Vending Associates v. Tomra Systems U.Sjgc, 655 F.Supp. 1122 (E.D. Pa. 1987)
Romann v. Geissenger Manu facturing Corp., 865 F.Supp. 255 (E.D. Pa. 1994)
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Tutu Wells Contamination Litigation v. Texaco, 846 F.Supp. 1243 (D. Vir. Is. 1993)

Visual Security Concepts, Inc. v. KTV, Inc.,
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PRELIMINARY STATEMENT

Given Given that the record is clear that Defendant that the record is clear that Defendant BRP-Rotaxthat the record is clear that && Co. KG (hereinafter "Rotax"), an Austrian corporation, && Co. KG (hereinafter "Rotax"), an Austrian corporation, has && Co. KG (hownow rely upon the alter ego theory to assert jurisdiction against Rowrong. Wrong. Under this theory, the jurisdictional contacts of the subsidiary, wrong. Under this theory, the jurisdictional contacts thethe controlling the controlling entity, i.e., the parent corporation, the controlling entity, i.e., the parent corporation, under the rational the privilege of conducting business in the forum by using the privilege of conducting business, Plaintiffs essentially argue the reverse --that the jurisdict Bombardier Inc. (hereinafter referred to Bombardier Inc. (hereinafter referred to as "BombardBombardier Inc. (he Rotax, Rotax, yet Plaintiffs point to how Bombardier controlled Rotax and not the other way around. Thus, tRotax, yet Plaintiff falls.

EvenEven assuEven assuming Even assuming that Plaintiffs can rely upon the alter <u>e20</u> theory to assert Jurisdiction PlaintiffsPlaintiffsPlaintiffs still cannoPlaintiffs still cannot demonstrate that Rotax is the alter ego of Bombardier. The record BombardierBombardier exerted undue domination and control over RotaBom piercingpiercing the corporate veilpiercing the corporate veil in order to establish jurisdiction over Rotax. Thus, piercing the corporate veil theorytheory to either assert jurisdiction over Rotax or product liability against Bombardier Rotax engine.

Recently Rotax uncovered limitedRecently Rotax uncovered limited shipments of spareRecently Rotax uncovered at the direction of its Wisconsin customer on an emergent basis. The shipments represent only 1.81% of Rotax's total business with that customer. Such isolated,

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sporadic contacts with the forum state do not rise to the level of minimum contacts sufficient to assert jurisdiction. Accordingly Defendants' Motion to Dismiss and Summary Judgment should be granted.

SUPPLEMENTAL STATEMENT OF FACTS

A. Rotax is a Separate Corporate Entity From Bombardier Inc.

Josef FUrlinger, an executive who has been employed by Rotax for the last fifteen years and is currently its director for new business development testified at his deposition as follows:

Q. Let's talk a little bit about the governing structure of Rotax? Do you understand my question?

- A. Yes.
- Q. Okay. Who runs and when I say "who," I mean title, the person. Who runs Rotax at the top on a day-to-day basis?
- B. Geschaetsfuehrer.

[THE INTERPRETER: It's translated either as manager director or as general manager]

- Q And as owner the owner of Rotax, Bombardier. Inc., is involved in the day-to-day operations of Rotax, is it not?
- A. No.
- Q. So you do not agree that they have some substantial control over how Rotax operates on a day-to-day basis?
- A. I do not agree to your soM,. They have no involvement on the day-to-day business.

[See Transcript of Deposition Testimony of Josef Fcirlinger, dated December 3, 2004, attached to Certification of Robert J. Kelly as Exhibit 1, T28:1-4-14; T33:1,17-T34:1-3]. Pursuant to the corporate structure, the General Manager is chosen by the shareholders. [Exhibit 1, T3 I:L9-121.

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- Rotax has its own management team. Claude Ferland, an executive with Bombardier testified as follows:
 - Q. Can you describe the upper level management Rotax working down from this vice-president/general manager position?
 - A. Yes. Harold had a management learn where he had a vice-president of finance responsible for all of the financial reporting and the financial performance of Rotax. He had a VP for human resources, HR VP. He had a VP engineering. So basically he had the full organization, like any typical entity what you would find....

[See Plaintiffs' APP-0032 - T32:1- I - 10].

Mr. Furlinger testified that Rotax makes its own decision regarding negotiating contracts.

He testified as follows:

- Q. Who would have knowledge whether Rotax has to get approval from Bombardier with regard to contracts that it's about to enter into?
- A. In the normal course of business of Rotax, we would not need to inform Bombardier, Inc., unless it has a significant

impact to the shareholders.

[Exhibit 1, T61:L]3-22]. Additionally, Rotax maintained its own liability insurance. [See Ferland Deposition Testimony, T68:L2-14, Plaintiffs' APP-00068]. Finally, Rotax owns its own property in Austria. Mr. Furlinger testified as follows:

- Q. Who owns the property that Rotax facilities are on in Austria?
- A. Rotax.

Exhi bit 1, T65: L I 1-13].

With regard to the Bombardier Inc. policy manual, Mr. Furlinger testified as follows:

- Q. Okay. Does Rotax have the Bombardier policy manual?
- A. Yes.

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- Q. And are there certain Bombardier policies that because of Austrian law do not apply to Rotax?
- A. That's correct.
- Q. Can you provide me with any of those policies that don't apply to Rotax?
- A. Just as an example I would make the traveling policy.
 Rotax has its own traveling policies to comply with the
 Austnian law, system and regulations.
- Q. Any other examples that you can think of.?
- A. There might be some more. Because we have a different working law as may be not as accomplished. So we have to respect the working law as for one thing, assessing the working law as one very critical law, and there would be definitely a different system and policy in place.

[Exhibit 1, T4111-L21]. Moreover, Rotax considers the policy manual to be more of a reference tool or guideline rather than a directive. Mr. Furlinger testified as follows:

Q. ... When we're referring to this scope here on 63 1, is it

When we're referring to this scope here on 63 1, is it your testimony that the way it's written it does apply to Rotax unless there's some Austrian law that would essentially trump this?

A. I would say that it would be used as a reference document or a guideline for Rotax Austria and Rotax as to follow their own procedure according to Austrian law.

[Exhibit 1, T40:1,9-251 [emphasis added].

B. Rotax's Limited Shipments of Spare Motorcycle Parts to Pennsylvania

During the period 1997-2002, Rotax made limited shipments of spare motorcycle parts to Pennsylvania which totaled 18.136,36 Euros at the direction of its customer, Harley Davidson located in Wisconsin. [See Affidavit of Josef Furlinger, dated February 14, 2005 1. The total value of those shipments represents only 1.81% of Rotax's overall sales to Harley Davidson

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during-theduring-the referenced time pduring-the referenced time period. Id. Rotax conducted corporate corporate offices located in Milwaukee, Wisconsin. Id. With the exception of the transactionscorporate offices located in AA,A, all deliveries to Halley Davidson were Ex works Gunskirchen, Austria. Id. It is Rotax's business pracA, all deliveries to designate designate all sales Ex works Gunskirchen. The limited sales ofdesignate all sales Ex works Gunskirchen. The limited sales emergentemergent basis at the request of Harley due to Harley's obligation to properly service itsemergent basis at the request States States military. Id. Due to the emergent nature of these requests, Harley required 24 hour States military. Id. Due to the emergent be arranged through UPS expedited, as reflected in the invoices. Id

The The invoices reflect that Harley's purchase order originated The invoices reflect that Harley's purchase order originated i RotaxRotax had with Pennsylvania in connection with these transactions was as a point Rotax had with Pennsylvania in aforementioned aforementioned special circumstances. Id. Rotax's aforementioned special circumstances. Id. Rotax's customer and in Wisconsin. Id.

InvoicesInvoices addressed to Rotax from the Society of Automotive Engineers and AvantInvoices addressed to Rot Pennsylvania Pennsylvania addresses. Id. However, Pennsylvania addresses. Id. However, the principal place of business of the S locatedlocated outside of Pennsylvania. Id. The total amount of the invoiceslocated outside of Pennsylvania. Id. The total amount written materials necessary for Rotax business and which could not be obtained elsewhere. Id.

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LEGAL ARGUMENT POINT I

PLAINTIFFS CANNOT RELY UPON THE ALTER EGO THEORY TO ESTABLISH JURISDICTION OVER ROTAX.

The Alter Ego Theory Is Used to Impute the Jurisdictional Contacts of the A. Subsidiary to the Non-resident Parent Corporation Based Upon the Parent Corporation's Control of the Subservient Subsidiary.

In general, piercing the corporate veil is permitted in only exceptional circumstances. Clemens v. Gerber Scientific Inc., No. 87-5949, 1989 U.S. Dist. LEXIS 376, at *4(E.D. Pa. January 13, 1989) (citing Reverse Vending Assocs. V. Tomra Systems U.S., Inc., 655 F. Supp. 1122, 1128 (E.D. Pa. 1987); Parker v. Bell Asbestos Mines. Ltd., 607 F. Supp. 13 97, 13) 99 (E.D. the proper exercise of a personal jurisdiction over a Pa. 1985). "As a general rule, nonresident corporation may not be based solely upon the contacts with the forum state of another corporate entity with which the defendant may be affiliated." Freudensprung v. Offs-hore Technical Services, Inc., 379 F.3d 327, 346 (5" Cir. 2004) (citing Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925)). There is a "presumption of institutional independence of related corporate entities" which may be rebutted only by "clear evidence" which requires a showing of "something beyond the mere existence of a corporate relationship

between a resident and nonresident entity to warrant the exercise of jurisdiction over the nonresident." Id. [citation omitted].

Tbus, the acts of a parentTbus, the acts of a parent corporation should not be attributed to the subsidiary corporationTbu of of assessing jurisdiction where there is no exercof assessing jurisdiction where there is no exercise of assessing jurisdiction FinancialFinancial Set-vicesFinancial Set-vices v. Charter Equip. Leas., 708 F. Supp. 664, 669 (E.D. Pa. 1989) [citation omitted]. 70 in CapiZZa?70 v. Walt Disney World

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Co., Co., 826 F. Supp. 53, 56-57 (D.R.I. 1993), F. Supp. 53, 56-57 (D.R.I. 1993), the Courtheld that F. Supp. 53, 56-57 (D.R.I. 1993) non-resident non-resident subsidiary corporation non-resident subsidiary corporation based up on the jurisdictional contacts non-resi failedfailed to show that the parent corporation acted as an agent for the subsidiary. failed to show that the parent corporation acted v.v. Old Rev. Old Repv. Old Republic Intern. Corp., 648 F. Supp. 634, 637 (N.D. 111. 1986), the Court held that it did not jurisdictionjurisdiction over the nonresident subsidiaries since there was no evidence that thejurisdiction over the nonresident subsidiaries. thethe parent corporation. In that case, the parent corporation. In that case, the non-resident defendants had no contacts with the forum explained:

> Thus,.... Thus, the only way that.... Thus, the only way that these two defendants could have transacted bus in the meaning of the long-arm statute is through the activities of the [parent corporation] as an clagent." clagent." However, in determining the existence of an agency relationship, the most importantimportant element a courtimportant element a court must consider is the extent to which the prin actionsactions of the agent with respect to theactions of the agent with respect to the matters entrusted by h rightright to "control" the [parent's] activities in any way Accordingly, we cannot construe the parent corporation] to have been an agent of the [subsidiaries] for purposes of submitting those subsidiary corporate entities to the jurisdiction of this Court.

Id. atId. at 637 [citing Restatement (Second) of Agency § 14 (19-58) and Ingersoll Milling Machine Co. v. J.Ingersoll Milling Machine Co., 508 F. Supp. 907, 912 (N.D. 111. 198 1)] [Emphasis added].

B. Plaintiffs Cannot Impute the Jurisdictional Contacts of Bombardier - the Parent Corporation -- to Rotax Since Plaintiffs Fail to Assert that Bombardier is the Alter Ego/Agent for Rotax.

Likewise, Likewise, in the present case, PlLikewise, in the present case, Plaintiffs fLikewise, Rotax Rotax - hRotax - had aRotax - had any control over the parent corporation - Bombardier Inc. so that the jurisdictional co parentparent corporation - Bombardier Inc. - should bparent corporation - Bombardier Inc. - should be imputed tparent corporation Plaintiffs Plaintiffs allege at length how Plaintiffs allege at length how Bombardier Inc. controlled Rotax - not the other way around in Opposition, pp. 10-19].

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Plaintiffs Plaintiffs expressly assert that "Rotax. Plaintiffs expressly assert that "Rotax. is the Plaintiffs expressly assert that "Rotax." Plaintiffs'Plaintiffs' Brief, p. 10]. ButPlaintiffs' Brief, p. 10]. But if the logic of the alter ego in the context of a jurisdictional inqui PlaintiffsPlaintiffsmust assert that Bombardier - the Plaintiffsmust assert that Bombardier - the entity which allegedly had the conta ego/agent of the non-resident entity - Rotax. Plaintiffs do not follow that logic.

The The fundamental requirement of control by the parent corp oration of the subservient, The fundamental requirement of heartheart of the equitable doctrine of heart of the equitable doctrine of theheart of the equitable doctrine of the alter ego corporation. The rationale is that the parent corporation, bycorporation. The rationale is that the parent corporation, by virtue of thethe forum state, purposefully availed itself of the privilegethe forum state, purposefully availed itself of the privilege of conduct thethe subsidiary so that jurisdicthe subsidiary so that jurisdiction over the subsidiary so that jurisdiction over the non-residen MotorMotor Of America, Inc., 781 F. Supp. 1079, 1085 (E.D. Pa. 1992). 1992). Indeed, the factual scenarioIndeed, the factual s opinion cited in Plaintiffs' opposing brief involved an attempt to assertopinion cited in Plaintiffs' opposing brief involved an atte corporation corporation based upon the parent corporation's control over the subservient subsidiary and not corporation based upon th asas ias in the present cas in the present case. See Clemens, 1989 U.S. Dist. LEXIS 376 at *3; Parker, 607 F. Supp. at 1399; In Vending Vending Assoc., 65 5 F. 65 5 F. Supp. at 1127; InIn re Paques, Inc., 277 B.R. at 634; Tutu Wells Contamination Litigation 1.~ Texaco, 846 F. Supp. 1243 (D. Vir. Is. 1993)

HoweHowever, However, the goal However, the goal of the equitable doctrine of alter ego is not served by applying it presentpresent case since it cannot be logically argued that Rotax availed itself of the privilege of conducting business inin Pennsylvania so as to allow tin Pennsylvania so as to allow this Cin Pennsylvania so as to allow this Court to assert jurisc RotaxRotax controlRotax controlled Bombardier Inc. In contravention of the alter ego theory, Plaintiffs argue the opposite - t Bombardier controlled

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Rotax, Rotax, 'Me doctrine Rotax, 'Me doctrine simply does not fit into the facts of this case and therefore, exercise of jurisdiction Rotax, and therefore, exercise of jurisdiction Rotax, and the same and the sam wouldwould offend the "traditional notions of fair play and substantwould notions of fair play and substantwould notions of fair play and substantwould not play and substantw Clause.

POINT 11

PLAINTIFFS CANNOT DEMONSTRATE THAT ROTAX IS THE ALTER EGO OF **BOMBARDIER INC. TO ESTABLISH EITHER JURISDICTION OVER ROTAX** OR LIABILITY FOR ALLEGED PRODUCT DEFECTS AGAINST BOMBARDIER.

A. To Establish an Alter Ego Relationship, There Must be Evidence of the Parent Corporation's Undue Domination and Control of the Subsidiary Corporation.

EvenEven assuming arguendo that Plaintiffs can rely upon that Plaintiffs can rely upon the altethat Plaintiffs can rely upon the altethat Plaintiffs can rely upon the alternative can rel Rotax, Rotax, Plaintiffs still cannot demonstrate that Rotax, Plaintiffs still cannot demonstrate that RotaxRotax, Plaintiffs still cannot demonstrate that RotaxRotax and Plaintiffs still cannot demonstrate that RotaxRotax and Plaintiffs still cannot demonstrate that RotaxRotax and Plaintiffs still cannot demonstrate that Rotax and Plaintiffs still cannot demonstrate the Rotax and Plaintiffs still cannot demonstrate the Rotax and P iisis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found only where "ftlhe degree of control exercised by the parent [is] greater than normally asis found on the parent [is] greater than normally as a supplication of the parent [is] greater than normally as a supplication of the parent [is] greater than normally as a supplication of the parent [is] greater than normally as a supplication of the parent [is] greater than normally as a supplication of the parent [is] greater than normally as a supplication of the parent [is] greater than normally as a supplication of the parent [is] greater than normally as a supplication of the parent [is] greater than normally as a supplication of the parent [is] greater than normally as a supplication of the parent [is] greater than normally as a supplication of the parent commoncommon own ership and directorship." Arch v. American Tobacco Co., Inc., 984Arch v. American Tobacco Co., Inc., 984F (citing(citing Savin Corp. v. Heritage Copy Prods., Inc., 661 F. Supp. 463, 469 (M.D. Pa. 1987661 F. Supp. 463, 469 (M.D. FibreboardFibreboard Corp., 710 F.2d 1154, 1160 (5" Cir. 1983)). "To establish an alterCir. 1983)). "To establish an alter-ego proveprove that [the parent corporation] controls the day-to-day operations of prove that [the parent corporation] controls the day-tosubsidiary subsidiary corporation] subsidiary corporation] can be said to be a mere department of [the parent corporation]." Id.subsi must must prove that them ust prove that the parent corporation exerted direct undue domination and control over the

In Clemens, the Court held that a number of factors are considered in the is an alter ego of its parent:

- 1) common officers and directors; 2) extent of the parent's decision over the subsidiary's policies and practices; the parent's ownership of the subsidiary; 3) lack of separation of daily operations; _10390076.1
- 4) consolidation of financial statements and tax returns; and 5) failure to obsme corporate formalities. Clemens, 1989 U.S. Dist. LEXIS 376 at *5 [citations omitted].

However, it is well settled that the existence of a factor, alone, is insufficient to find an alter ego relationship. For instance, a finding of a 100% ownership of the subsidiary by the

parent corporation is not dispositive. Savin Corp., 661 F. Supp. at 469 (citing Hargrave, 710 F.2d at 1060; Quarles v. Fuqua Industries, Inc., 504 F.2d 1358, 1364 (10' Cir. 1974); Croyle v. Texas E astern Corp., 464 F. Supp. 377, 379 (W.D. Pa. 1979)).

LikeLikewise, Likewise, selikewise, significant "fo]verlapping directors and officers do not alone establish an alter Arch, Arch, 984 F. 984 F. Supp. at 838 (citing Poe v. Babcock Intl, plc, 662 F. Supp. 4, 6 (M.D.- Pa. 1985) (refusing to 662 F. Supp alteralter ego theory ofalter ego theory of Jurisdiction where there are several overlapping directors stating that 'wherealter ego the constitutes one hundred percent of the stock holders of the subsidiary, it is constitutes one hundred percent of the stockhold which which are common to the boards of both."); see also see also Clark v. Matsushita Elec. Indus. Co., Matsushita Elec. Indus. Co., 10681068 (M.D. Pa. 1993) ("Common officers 1068 (M.D. Pa. 1993) ("Common officers and directors . . . axe not ne Corp., Corp., 661 F. Supp. at 469.661 F. Supp. at 469. In SaVin Corp., four oftwelve directors of a subsidiary four oftwelve directors of its parent corporation, and four of the twelve directors of the subsidiary were also director of the corporation, operations. Operations of the subsidiary, operations of the subsidiary, and the parent company had input regarding theoperations of executives. Executives. Id. Yet, executives. Id. Yet, the Court in Savin Corp. concluded that there was insufficient evidence to "conv thatthat [the parent] exercised the type of control over [the subsidiary's] day-tod an alter ego relationship." Id.

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-- Finally, reporting the- Finally, reporting the subsidiary's financial information within the parent corporations' annual- Financial equate with an alter ego relationship. In Clark, the Court held that anot equate with an alter ego relationship. In Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship. In Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship. In Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with an alter ego relationship in Clark, the Court held that anot equate with a clark ego relationship in Clark, the Court held that anot equate wit

Indeed,Indeed, courts havIndeed, courts have recoIndeed, courts have recognized that "a corporate parent may pro subsidiarysubsidiary in the ordinary course of business without calling into question ..." Central States v. Reimer Express World Corp., 230 F.2d 934, 945 (7'..." Central States v. Reimer Express World Corp., 230 F.88585 F. Supp. 9885 F. Supp. 980, 988-89 (S.D. Tex. 1995); Calvert v. *Huckins*, 875 F. Supp. 674, 678-79 (E.D. Cal. 1995). CentralCentral States, the Court explained thCentral States, the Court explained that "[p]aCentral States, the Court expect that performing these subsidiaries ... [slucb parents do not expect that performing these subsidiaries." Central States, 230 F.2d at 945. detailed trules concerning every facet of detailed rules concerning every facet of the subsidiary*s business, the subsidiary of the parent. See Arch, 984 F. Supp. at 838.

B. Bombardier Inc. Did Not Exert Undue Domination and Control Over Rotax.

InIn the present case, In the present case, Plaintiffs cannot In the present case, Plaintiffs cannot prove that Rotax was the a linin this jurisdiction is clear that Plaintiffs' allegations of Bombardier's ownership of Rotax; conu-non ofin this jurisdiction betweenbetween the two entities; or Rotax's submission of financial state ments between the two entities; or Rotax's sist the alter ego of Bombardier. As courts have recognized, such commonalties are to is the alter ego of Bombardier. As courts have of Bombardier's ownership of Rotax. What is dispositive in the Bombardier's ownership of Rotax. To day activities of Rotax. However, Josef Hirlinger, an executive who has been employed by Rotax fifteen years and is currently its director for new business - 12-390076.1

development confirmed unequivocally that Bombardier is not involved in the day-to-day operations of Rotax. [Exhibit I T28:L4-14; T3311 7-T3) 4:L3].

Moreover, Moreover, Mr. Furlinger testified that Rotax makes its own decision regarding negotia Moreover, Mr. Furling maintained maintained its own liability insurance; and owns its own property in Austria. [Exhibit 1, T61:L] 3-22; T65:L1)-13; T65:L1)-13; and Plaintiffs' AAPAPP-00068 -T68:L2-14]. Claude Ferland, an executive Bombardier, testified that Bombardier, testified that Rotax had its own management team consisting Bombardier, testified

humanhuman resources, a vicehuman resources, a vice president of finance, and a vice president for engineering. [Seehuman resources T32:LI-101.T32:LI-101. He chara cterized Rotax's organization as a full He chara cterized Rotax's organization as a full He [See Plaintiffs' APP-0032 -T32:LI-10].

The The fact that Rotax has a copy The fact that Rotax has a copy of the Bombard controls it. Rotax has its own policies and procedures separate from the

BombardierBombardier manual. [Exhibit 1, T41:LI-L211. Moreover, Rotax considers the policy manual to be more of a reference too] or guideline rather than a directive. [Exhibit 1,T40:L9-25]. The

existence existence of a policy manual promulgated by existence of a policy manual promulgated by a parent corporation to its subthethe parent-subsi diary relationship without callingthe parent-subsi diary relationship without calling into the parent-subsi diary Circuit Circuit Court of Appeals recognized, parent corporations regularly provide services for their subsidiaries Circuit Court of Appeals should not be the basis for finding liability.

Finally, Plaintiffs make a number of inaccurate statements regarding Rotax in their opposing brief in an attempt to mischaracterize it as an agent of Bombardier. Plaintiffs assert that Bombardier hires the Rotax General Manager and cites to Mr. Ferland's deposition testimony. [See Plaintiffs' brief, p. 12]. However, Mr. Ferland makes no such statement in the

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referenced section. In fact, at his deposition, Mr. Furlinger clarified that pursuant to the corporate structure of Rotax, the general manager is chosen by the shareholders. [Exhibit 1, T3 I:L9-12]. Rotax's ten member board consists of only three employees of Bombardier. [Plaintiffs' App0028-0030-T28:LI9-T30:L14]. The rest of the board consists of employees of Rotax and others outside of Bombardier. Id. Plaintiffs also mistakenly assert that Rotax: submits joint financial statements to Bombardier and again cites to Mr. Ferland's deposition testimony. [See Plaintiffs' brief, p. 12]. Again, Mr. Ferland makes no such statement. Mr. Ferland testified only that Rotax submitted financial statements to him so that certain results could be consolidated. [See Plaintiffs' APP-0033 -T33:Ll-]Oj. InnowaydidMr.Feriand testify that joint financial statements are prepared between the two corporations. Id. Finally, Plaintiffs incorrectly asserts that Rotax has no independence with regard to its budgets or strategic plans since it is required to submit same to Bombardier. [See Plaintiffs' brief, p. 14]. The mere fact that a subsidiary submits such reports to the parent corporation does not illustrate undue control or domination. As part of the nature of the parent and subsidiary relationship, that is to be expected. Indeed, Plaintiffs point to no evidence that Bombardier controlled the preparation of those budgets or plans. In short, Plaintiff-, cannot establish that Bombardier controlled the day-to-day activities of Rotax sufficient to find an alter ego relationship.

C. As Plaintiffs Cannot Establish That Rotax is the Alter Ego of Bombardier Inc., Plaintiffs Cannot Rely Upon the Alter Ego Theory to Impute Product Liability against Bombardier for the Allegedly Defective Rotax Engine.

Defendants Bombardier Inc. and Bombardier Corporation (hereinafter referred to as "BC") move for Surn-mary Judgment dismissing Plaintiffs' Complaint on the ground that Bombardier and BC did not design, manufacture, or otherwise distribute or sell the alleged defective Rotax engine which is the subject of this action. In their opposition, Plaintiffs argue,

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interinter glia, that Bombardierthat Bombardier Inc. should be held liable for the alleged product defects becausethat Bombardier thethe alter egothe alter ego of Rotax. Even Plaintiffs' argument of a joint venture between Rotax and Bombardier withthe alter toto the production of the engine to the production of the engine to the production of the engine essentially relies upon the alt claimsclaims against BC. [See Claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See Plaintiffs' Brief, p. 34, fh. 8]. However, as demonstrated claims against BC. [See

POINT III

PLAINTIFFS CANNOT ESTABLISH JURISDICTION AGAINST ROTAX VIA THE LIMITED SHIPMENTS OF SPARE MOTORCYCLE PARTS TO PENNSYLVANIA AS SUCH CONDUCT DOES NOT RISE TO THE LEVEL OF MININUM CONTACTS.

A. Sporadic, Isolated Shipment of Products to the Forum State is Insufficient to Confer Personal Jurisdiction Over a Non-resident Defendant.

In Asahi Metal Industry Company v. Superior Court OfCOI~f0l-nia, Solano County, U.S. 102 (1987), the Supreme Court presented three separate tests to finding jurisdiction with respect to actions against producers and sellers of goods via the stream of commerce theory. The Third Circuit applies all three tests to ascertain whether a non-resident defendant's contacts with the forum state was sufficiently continuous and systematic to justify the exercise of jurisdiction. Visual Security Concepts, Inc. v. KTV, Inc., 102 F. Supp. 2d 601, 606-07 (E.D. Pa. 2000), affd without opinion, 2001 U.S. App. LEXIS 23555 (2001) Justice O'Connor's test required that the placement of a product into the stream of commerce must be accompanied by some "additional conduct of the defendant that may indicate an intent or purpose to serve the market in the foruin State." Asahi, 480 U.S. at 112. Justice Brennan's standard for personal jurisdiction requires a "regular and anticipated flow of the defendant's products" into the forum and that the defendant

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"is"is aware that"is aware that the final product is being"is aware that the final product is being marketed in the forum State, that cannot come as a surprise." Id. at 117. Justice Stevens' test requirescannot come as a surprise." Id. at 117. Justice Stevens' to into the stream of commerce of sufficient "amount, value, and hazardous character." *Asahi*, 480 U.S. at 122.

ConsistentConsistent with the *Asahi* tests, the District Courts of this jurisdiction have recognized thattests, the District Courts of this jurisdiction have recognized thattests, the District Courts of this jurisdiction have recognized thattests, the District Courts of this jurisdiction have recognized thattests, the District Courts of the level of a product into the forum sufficients ufficient to rise to the level of minimum contacts to justifysufficient to rise to the level of minimum co

Geissen er Mfg. Corp., 865 F. Supp. 255 (E.D. Pa. 1994) (no jurisdiction despite 24% of its 9

auto-related auto-related sales within Pennsylvania); *Modern Mailers, Inc. Modern Mailers, Inc. v. Johnson & Quin, Inc., 844 F.84* (E.D.(E.D. Pa. 1994) (no jurisdiction despite .5% direct sale to Penn(no jurisdiction despite .5% direct sale to Pennsylvan(no *Corp., 785 F. Supp. 494 (M.D. Pa. 1992)* (no jurisdiction despite I % of sales of footwear in Pennsylvania).

InIn Rosenstein, PlaintiffPlaintiff alleged that the Court should exercisePlaintiff alleged that the Court should exercise jut onto the ground that the defendant sold its products in the forum state on the thethe Court declined to exercise jurisdiction finding that the sales were so limited that Defendant could the Court declined to exercise onto notice that it would be son notice that it would be subject to suit in on notice that it would be subject to suit in that state Pennsylvania strawberry sales do provide the minimum contacts required .05%.05% of its produce to Pennsylvania purchasers. This small amount of busi.05% of its produce to Pennsylvania purchase notice that it might be haled into court in Pennsylvania." Id.

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Moreover, Moreover, exercise of jurisdictionMoreover, exercise of jurisdiction is improper where the limited business what statestate is not even central to the non-resident's business. "A court should also considstate is not even central to the non-recorporation's contacts with a given forum are 'central to the conduct of its business v. Dumexv. Dumex Medical Surgical, 64 F. Supp.2d 448, 450 (E.D. Pa.64 F. Supp.2d 448, 450 (E.D. Pa. 1999) (citing Providen FedFed S & L Ass'n, 8 19 F.2d 434, 43 8 (3d Cir, 1987)). Ass'n, 8 19 F.2d 434, 438 (3d Cir, 1987)). In Molnlycke Health Mol

B. Rotax's Limited Shipments of Spare Motorcycle Parts to Pennsylvania is Insufficient to Confer Personal Jurisdiction Over a Non-resident Defendant.

RotaxRotax recently discovered purchase orders Rotax recently discovered purchase orders and invoices illustrating limited partsparts which were shipped to Pennsylvania at the direction of a customerparts which were shipped to thethe pthe period 1997-2002, Rotax made limited shipments of spare motorcycle parts to Pennsylvania which period 1997-218.136,3618.136,36 Euros at the direction of 18.136,36 Euros at the direction of its Wisconsin customer, Harley Davidson. [See A TheThe totai value of those shipments represents only 1.81% of Rotax's overall sales to The totai value of those shipments represents with Harley Davidson through

'The records were produced to Plaintiffs' counsel subsequent to Plaintiffs' submission of their opposing brief because Rotax was not initially requested to produce same. See para. 12 of Affidavit of Josef FurhDger.

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Harley's Harley's corporate offices Harley's corporate offices locatedHarley's corporate offices located in Milwaukee, Wisconsin. In Exhibit A, all deliveries to Harley Davidson were Ex works Gunskirchen, Austria. Id. It is Rotaxin Exhibit A, all deliveries practice practice to designate all sales Ex works Gunskirchen. practice to designate all sales Ex works Gunskirchen. Id. The limited sa basis basis at the request of Harleybasis at the request of Harley due to Harley's obligation to properly service its customer Id.Id. DueId. Due to the emergent nature of these requests, Harley required 24 hour delivery which could only Id. Due to the emergent through UPS or DHL expedited, as reflected in the invoices. Id.

Moreover, Moreover, the invoices reflect that Harley's Moreover, the invoices reflect that Harley's purchase order originate only only contact Rotax had only contact Rotax had with Pennsylvania in connection with these transactions was as a point only contact Rotax had only contact Rotax had with Pennsylvania in connection with these transactions was as a point only contact Rotax had onl

In In short, these isolated, sporadic In short, these isolated, sporadic shipments of spare motorcycle parts of limited volume as small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material, cannot constitute systematic and small amount of written material.

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CONCLUSION

BasedBased upon the reasons setBased upon the reasons set forth above, BRP Rotax GmbH & Co. KG respectfully request

FirstFirst Amended ComplaintFirst Amended Complaint be dFirst Amended Complaint be dismissed, as this Court does not ha GmbHGmbH & Go. KG. Defendant Bombardier Inc. also respectfully requestsGmbH & Co. KG. Defendant Bombardier bebe dismissed, as it did not design, manufacture, sell, or otherwise distribute be dismissed, as it did not design, manufacture, sell, subject of this litigation.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP Attorney for Defendants BRP-Rotax GmbH & Co. KG and Bombardier Inc.

BY:

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3 3 Washington Street - 18" Floor

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And

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P.A. Attorney ID 34496 The Curtis Center-Suite 1130East Independence Square West Philadelphia, PA 19106

Date: February 14, 2005

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THERE SA MARIE SIMEONE, et a]. CIVIL ACTION NO. 02CV4852

Plaintiffs, CERTIFICATION OF ROBERT J.
KELLY ESO IN SUPPORT OF

KELLY, ESQ. IN SUPPORT OF DEFENDANTS' MOTION TO

COMPLAINT AND MOTION FOR SUMMARY JUDGMENT

DISMISS PLAINTIFFS'

BOMB ARDIER-ROTAX GmbH & Co. KG, et a]., Defendants.

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1, ROBERT J. KELLY, Esq., of full age certifies as follows:

I. I am an attorney at law of the State of New Jersey and am a partner of the firm of

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, attorneys for Defendants, BRP-Rotax GmbH

& Co. KG f/k/a Bombardier-Rotax GmbH & Co. KG, Bombardier, Inc. and Bombardier

Corporation in the above-entitled matter.

2. 1 am in active charge of handling this file and in such capacity, am fully familiar with the facts stated herein.

3. Annexed hereto as Exhibit I is a true and accurate copy of the Transcript of the Deposition Testimony of Josef Fiirlinger, dated December 3, 2004.

1 certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Dated: February 14, 2005 Robert J. Kelly, Esq.